No. 163

In the Supreme Court of the United States

OCTOBER TERM, 1945

FIRST TRUST & DEPOSIT COMPANY AND [illegible]
BALLARD, AS EXECUTORS OF THE LAST WILL AND
TESTAMENT OF [illegible],
PETITIONERS,

v.

FRANK J. [illegible],
COLLECTOR OF REVENUE,
TWENTY-[illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE [illegible]
CIRCUIT

BRIEF [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 151

FIRST TRUST & DEPOSIT COMPANY AND EDITH G. BALLARD, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF WILLIAM M. BALLARD, DECEASED, PETITIONERS

v.

FRANK J. SHAUGHNESSY, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE TWENTY-FIRST DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court filed no formal opinion. Its discussion of the merits of the respondent's motion for a directed verdict appears in the record at pages 206 to 212. The opinion of the Circuit Court of Appeals (R. 243-248) is reported in 134 F. 2d 940.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1943. (R. 264–265.) The petition for a writ of certiorari was filed on July 7, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain transfers had been made by the decedent "in contemplation of death."

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]:
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> * * * * *
>
> (c) [as amended by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169] To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take

effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

* * * * *

STATEMENT

The decedent, William M. Ballard, died on November 27, 1935, at the age of 65. (R. 238, 239.) The present suit was instituted by Ballard's executors to recover that portion of the estate taxes which resulted from the determination by the Commissioner of Internal Revenue that Ballard in March, 1935, had transferred nine life insurance policies in contemplation of death.

The following are the facts concerning these policies:

On January 16, 1929, Ballard executed a trust with respect to nine life insurance policies. (R. 217.) The premiums upon the policies were to be paid from the income of the trust or from cash furnished from time to time for that purpose by Ballard. Any excess income not required for premium payments was to be paid to Ballard during his life. Upon Ballard's death the proceeds of the policies were to be invested by the trustees and the income therefrom was to be paid to his wife for her life. Upon her death or upon Ballard's death, if his wife did not survive him, the proceeds were to be paid in equal shares to their daughters[1] (R. 217–220.) Ballard reserved the right to change the beneficiaries of the trust other than to designate himself as beneficiary. (R. 222.)

In December, 1934, Ballard was concerned as to whether the policies under the 1929 trust would be subject to an estate tax upon his death. He consulted his attorney who advised him that owing to changes in the law the policies would be subject to inclusion in his gross estate. (R. 181–184.) Accordingly, for the purpose of avoiding these

[1] Eight days before the 1929 trust was created the decedent executed his will leaving his entire estate (with the exception of personal items and a small legacy) in trust for the same beneficiaries and with the same interests as that provided for in the 1929 trust. (R. 204–205, 234–237.)

estate taxes and the resulting reduction in the property which would pass to his wife and daughters upon his death[2] Ballard on March 26 and 27, 1935, terminated the 1929 trust and assigned the nine policies to his wife.[3] His wife in turn on March 28, 1935, placed the nine life insurance policies in a new trust (R. 225) with provisions similar to the 1929 trust in that the income upon the proceeds was payable to her for life and upon her death the trust corpus was payable to the daughters. If she died before Ballard, the trust was to end and the policies were to revert to him absolutely. (R. 227–229.) The new trust reserved to Mrs. Ballard the right to withdraw any policy and to exercise any privilege which was reserved in favor of its "owner." (R. 226.)

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[2] Had the insurance policies remained in the 1929 trust the proceeds would have been includible in the decedent's gross estate under Section 302 (c) as a transfer intended to take effect in possession or enjoyment at or after death, or under Section 302 (d) because of the reserved power to amend the trust. This tax would necessarily have been borne by the beneficiaries of the 1929 trust since they were also the beneficiaries under the decedent's will. (R. 234.)

[3] The termination of the 1929 trust and the assignment of the policies were accomplished as follows: On March 26, 1935, the decedent exercised the reserved right to change the beneficiaries of the 1929 trust by directing that upon his death the proceeds of the policies were to be paid to his wife. (R. 202–203.) The decedent then relinquished all further power again to change the beneficiary designations by making absolute assignments of the policies to his wife who had originally been designated as beneficiary of all the policies. R. 214–216.) been designated as beneficiary of all the policies. (R. 214–216.)

At the time of the transfer of the nine policies in March, 1935, Ballard was 64 years of age, actively engaged in his business and apparently in good health although he had had a record of serious illnesses. (R. 206–208.) He died eight months later in November, 1935.

The present suit came on for trial in the District Court before a jury. (R. 33.) The foregoing facts were introduced by stipulation and testimony. After both sides had closed, the respondent moved for a directed verdict. (R. 205.) This motion was granted and judgment entered in favor of the respondent. (R. 28, 213.) The Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

ARGUMENT

The decision below is correct. It presents no conflict and there is no occasion for further review.

This Court has stated that the test of whether a transfer is made in contemplation of death is always to be found in the donor's motive and that a transfer may be in contemplation of death although the donor is not under the apprehension that death is near at hand. *United States* v. *Wells,* 283 U. S. 102, 117, 119; see also *McCaughn* v. *Real Estate Co.,* 297 U. S. 606; *Purvin* v. *Commissioner,* 96 F. 2d 929 (C. C. A. 7th), certiorari denied, 305 U. S. 626. The petitioners, as plaintiffs in the District Court, had the burden of

establishing a dominant or at least a substantial life motive for Ballard's transfer of the life insurance policies. *Smails* v. *O'Malley,* 127 F. 2d 410 (C. C. A. 8th); *McGrew's Estate* v. *Commissioner,* 135 F. 2d 158 (C. C. A. 6th); *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll,* C. C. H. Federal Inheritance, Estate and Gift Tax Service, pars. 10,011, 10,016 (W. D. Pa.), affirmed per curiam, July 9, 1943, on District Court's opinion (C. C. A. 3rd) (not yet reported).[4] They failed to meet this requirement. Every indication in the record is that Ballard's dominant purpose was to provide for his family after his death. This purpose was accomplished by both the 1929 and 1935 trusts. At the time of the transfer in 1935 the nine life insurance policies had a maturity value of $130,000 but a cash surrender value of only $50,410.53. (R. 4.) Immediate enjoyment of the policies obviously was not expected. Cf. *Liebmann* v. *Hassett* (Mass.), decided June 22, 1943 (1943 Prentice-Hall, par. 62,739). The only motive disclosed for the termination of the 1929 trust and Ballard's assignment of the policies to his wife in 1935 was his desire to avoid estate taxes upon the insurance proceeds and the resulting reduction in the property passing to his

[4] This would have been petitioners' burden even if the transfer had occurred more than two years before death. *Smails* v. *O'Malley, supra.* Here the transfer occurred less than two years before death and therefore fell within the statutory presumption.

wife and daughters upon his death. This motive was concerned with circumstances surrounding Ballard's death and not with activities or purposes associated with his life. It therefore not only failed to sustain petitioners' position, but, to the contrary, served to support the Commissioner's determination that the policies had been transferred in contemplation of death. See *Farmers' Loan & Trust Co.* v. *Bowers,* 98 F. 2d 794, 796 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *Oliver* v. *Bell,* 103 F. 2d 760, 763 (C. C. A. 3rd); *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra.* No counterbalancing or offsetting life motive was offered by the petitioners for the jury's consideration. Cf. *Colorado Bank* v. *Commissioner,* 305 U. S. 23. Accordingly, it was proper for the District Court to enter judgment in favor of the respondent.

The petitioners assert (Pet. 12) that the decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *United States* v. *Wells, supra.* This contention is based upon the sentence in the court's opinion that the condition of Ballard's health and his state of mind towards his death had nothing whatever to do with the case. (R. 248.) This statement of the court below must, of course, be read in the light of the facts in the case. Ballard expected the proceeds of the life insurance policies to be

enjoyed by his family after his death and his purpose in effecting the transfer in 1935 was to save estate taxes and thereby prevent a reduction in the property which he desired his family to enjoy upon his death. In these circumstances the testimony that Ballard was in good health was not evidence or proof of some unspecified but coexistent life motive for the transfer. The state of Ballard's health merely showed an absence of any consciousness that death was near. The apprehension of approaching death, however, is not the state of mind required to establish a transfer in contemplation of death within the meaning of the statute. *United States* v. *Wells, supra.*

The petitioners also urge (Pet. 12) that the decision of the Circuit Court of Appeals is in conflict with *Denniston* v. *Commissioner,* 106 F. 2d 925 (C. C. A. 3rd). We submit that there is no conflict. In the *Denniston* case the Circuit Court of Appeals for the Third Circuit concluded that a desire to save estate taxes was not conclusive of a mental state such as is contemplated by the statutory phrase "contemplation of death" where a coexistent motive to complete a long established policy of dividing property equally among children was also present. However, where the controlling motive for an inter vivos transfer was the transferor's desire to escape the payment of estate taxes the Third Circuit has agreed that the transfer must be considered to have been made

in contemplation of death. In *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra,* the District Court so held and the Circuit Court of Appeals for the Third Circuit affirmed per curiam "for the reasons sufficiently and satisfactorily given in the opinion" of the District Court. In the case at bar no coexistent life motive was suggested. Furthermore, the Circuit Court of Appeals for the Second Circuit did not state or even imply that a desire to save estate taxes was ever conclusive evidence that a transfer had been made in contemplation of death. The petitioners erroneously assume this to have been the ruling of the Circuit Court. Rather, in accord with its prior opinion in *Farmers' Loan & Trust Co.* v. *Bowers, supra,* and in accord with the opinions of the Circuit Court of Appeals for the Third Circuit in *Oliver* v. *Bell, supra,* and *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra,* the Second Circuit viewed a desire to avoid estate taxes as a factor which could be taken to support a Commissioner's determination that a transfer had been made in contemplation of death. In any event a party having the burden of proving that a transfer had not been made in contemplation of death has failed where the only evidence introduced discloses that life insurance policies have been transferred for the purpose of saving estate taxes upon the proceeds of the policies at the insured's death and to prevent the consequent

reduction in the property which the transferor expected his family to enjoy only after his death.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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